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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 6

JOSEPH CARROLL, RICHARD NORTON, J. B. STONER, CHARLES LYNCH, ROBERT LYONS, WILLIAM BRAILSFORD, and the NATIONAL STATES RIGHTS PARTY,

Petitioners,

—v.—

THE PRESIDENT and COMMISSIONERS OF PRINCESS ANNE COUNTY, COMMISSIONERS OF SOMERSET COUNTY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF MARYLAND

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	PAGE
1. Pre-trial	2
2. Trial	6
3. Appeal	8
CONCLUSION	11
APPENDIX	
Ordinance 22B (46)-1	1a
Letter of William H. Zinman to Edgar Jones	3a
Letter of Edgar Jones to William H. Zinman	4a
Letter of Clerk of Court of Appeals of Maryland to William H. Zinman	6a
Motion to Advance Case for Hearing and Argument	7a
Order of Court	9a
Letter of William H. Zinman to Clerk of Circuit Court	10a
Letter of William H. Zinman to the Court of Appeals of Maryland	12a
Letter of Clerk of Court of Appeals of Maryland to William H. Zinman	13a

PAGE

TABLE OF AUTHORITIES

United States Constitution, First Amendment 1, 2, 6, 9

Maryland Rules:

Rule BB72 2-3

Rule 845(c) 8

Princess Anne County Ordinance 22B(46)-1 2

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Respondents at pp. 5-7 of their Brief have urged that this case is moot because, they contend, petitioners could have expedited their case under Maryland procedure but did not do so. In fact, petitioners were concerned throughout these proceedings with advancing this case in order to remove as quickly as possible the restrictions that had been placed upon the exercise of their First Amendment rights. This Reply Brief is submitted pursuant to Rule 41(3) to show what steps petitioners in fact took.

It should be noted that petitioners have previously argued that this case is not moot because it has created a menacing device for prior restraint constituting a con-

tinuing "chilling effect" on speech that must be disapproved under the First Amendment. Thus, the *ex parte* injunction, having been expressly approved by the court below, remains available to officials for advance curtailment of unpopular speech.[1] Further, petitioners have shown that county officials are continuing to impose prior restraints upon speech by virtue of their refusal to issue petitioners a permit[2] to conduct a rally similar to that originally held in the county. In addition there are other arguments that this case is not moot in response to the contentions raised in the Brief for Respondents.

1. *Pre-trial*

First, respondents argue that petitioners could have obtained a hearing on two days' notice pursuant to Maryland Rule BB72[3] and thus imply that within two days of

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[1] The *ex parte* injunction is of course the most extraordinary remedy found in the law and one that is universally used sparingly, even in non-speech cases. In Maryland such injunctions are hardly ever granted as a matter of practice. In cases where such relief is requested in Maryland, the local practice is for the judge to summon all counsel, and in the absence of counsel, the parties themselves, before any such order is signed. Where questions of fact or law arise the matter is set down for immediate hearing before an order is issued. Of course an *ex parte* injunction may be issued without these safeguards, but as a matter of local practice they are almost always followed. None of them were employed in this case before the *ex parte* injunction was issued.

[2] Only after petitioners' rally in Princess Anne on August 6th, did the county enact an ordinance requiring a permit on August 24th. The ordinance, 22B(46)-1, containing no standards for the exercise of administrative discretion, was enacted as an emergency provision in order to render it effective immediately. It appears in the Appendix at pp. 1a-2a.

[3] Rule BB72. Ex Parte Injunction

a. When May Be Granted.

Any ex parte injunction shall not be granted unless it appears from specific facts shown by affidavit, or a verified pleading with

the August 7, 1966 *ex parte* Temporary Order, its validity could have been settled at the trial court level. In fact petitioners could not have obtained a hearing any earlier than they did. Confusion arose in the first place because of the county's failure to serve petitioners William Brailsford, Robert Lyons, Richard Norton, and J. B. Stoner with a copy of the temporary order (R. 76). Nor was the National States Rights Party as such ever served (R. 76-77). When the parties were able to finally secure counsel, he protested to the court concerning the county's failure to serve some of the petitioners (R. 76-77), a serious defect when a court has issued an *ex parte* injunction of any sort.

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or without supporting affidavit or sworn testimony, that immediate, substantial and irreparable injury will result to the applicant before an adversary hearing can be had. The judge to whom application is made for an ex parte injunction may, in his discretion, communicate informally with the person against whom the injunction is sought, or his attorney, prior to taking action upon the application.

b. Service—Contents—Expiration—Extension.

An ex parte injunction shall be served forthwith on the adverse party by the quickest possible means; it shall give the adverse party leave to move for a hearing on not more than two days' notice; and it shall expire by its terms within such time after entry as the court may fix. Such time shall not exceed ten days, in case of a resident, and shall not exceed thirty-five days, in case of a nonresident. The court may within the time so fixed, for good cause shown, extend such time for a like period or for a longer period if the party against whom the injunction is directed consents.

c. Motion for Relief—Early Hearing.

A motion for relief against an ex parte injunction shall be set down for hearing at the earliest possible time.

d. Hearing—Burden on Applicant—Dissolution.

At the hearing, the applicant who obtained the ex parte injunction shall have the burden of showing the necessity or propriety of continuing the injunction, and if he does not, the court shall dissolve the injunction.

The matter of service was further confused since petitioners were unable to secure counsel immediately because of the unpopularity of their cause.[4] Petitioners approached several attorneys who refused to become associated with the case. Failing their attempt to hire private counsel after searching for nearly a week, they made application to the local affiliate of the American Civil Liberties Union in Baltimore.[5] The rules of the Maryland affiliate require convening the legal panel to decide if a case should be taken by the ACLU. An emergency meeting of the legal panel held on August 12th voted to assume the case.

The next day, August 13th, William H. Zinman and Garrett Power were assigned as ACLU counsel for petitioners. Prompt contact was made with one of petitioners on Sunday and Monday, August 14th and 15th, and counsel filed an answer August 15th, requesting a recision of the Temporary Order of August 7th (R. 9). This pleading was received by the Circuit Court the next day, August 16th.

It is clear that with inadequate service of process and difficulty in securing counsel, expedition of this case was beyond petitioners' control until counsel was assigned on August 13th. From the time of their assignment, voluntary ACLU counsel—though retained without fee—lost no time and went further in doing what they could to bring the matter to hearing and final resolution.

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[4] The details concerning petitioners' difficulty in obtaining counsel are found in the affidavit of Joseph Carroll, which has been filed with the Clerk of this Court and served on respondents.

[5] For details concerning the circumstances and timing of involvement of ACLU counsel in this case, see affidavit of William H. Zinman, which has been filed with the Clerk of this Court and served on respondents.

In order to further expedite the case, counsel for petitioners, who were unfamiliar with local practice in Somerset County, attempted to secure help from local Somerset County attorneys but were unable to do so. On August 15, 1966, the day petitioners sent their answer to the trial court, counsel wrote to the President of the Somerset County Bar Association, who was special counsel for the prosecution at trial (R. 25), requesting that local counsel be assigned by the Bar Association to assist ACLU counsel.[6] The purpose for the request was twofold.[7] First it was felt that local counsel could assist in expediting the case pursuant to the intricacies, rules and customs of local practice, with which he but not ACLU counsel, would be familiar. Further, since ACLU counsel were about 150 miles away in the city of Baltimore, requiring an entire day to reach and return from Somerset County, it was felt that local counsel was necessary if the matter was to be resolved with the least delay. In addition, the extraordinary nature of the proceeding—a hearing on an *ex parte* injunction—was felt to require consultation with counsel familiar with local practice.

The reply of the President of the Somerset County Bar Association is itself an indication of why it would be unfair to hold petitioners responsible for whatever delay occurred in this case being heard. The president advised counsel by letter of August 16, 1966[8] that "our small association has never taken any action on the suggestion that

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[6] App., *infra*, p. 3a, Letter of August 15, 1966 to Edgar Jones, Esq. from William H. Zinman.

[7] See affidavit of William Zinman, *supra*.

[8] App., *infra*, pp. 4a-5a, Letter of August 16, 1966 to William Harris Zinman, Esq. from Edgar Jones.

attorneys be assigned from the association to participate in 'unpopular causes'", and that local bar association members would prefer to avoid appointments even to criminal cases. The letter noted that four of the county's seven attorneys were representing the county in this case, leaving only three others. One of these "I am sure would not be available," as it was expected was the case with the other law firm, since "one of these partners is running for office and would not want to get on what possibly is the unpopular side."*

The picture that emerges is the same one which petitioners found wherever they searched for representation in this matter. Their cause was so unpopular they could not secure representation. Where First Amendment rights have been directly infringed through the issuance of an *ex parte* injunction, petitioners should not be estopped from testing the validity of that injunction because they could not find lawyers who would risk associating themselves with petitioners' cause. This is especially so where the "chilling effect" of the *ex parte* injunction device remains because it has been judicially approved as available in such cases and where, as here, petitioners cannot today get a permit to speak without accepting as a condition the censorship of their remarks.

2. *Trial*

The hearing on the *ex parte* injunction was held on August 17, 1966, the date scheduled in the Temporary Order. During the hearing, the Court declined the suggestion that it

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* See Appendix, Petition for a Writ of Certiorari to the Court of Appeals in Maryland in this case, Letter of July 25, 1967 to Joseph J. Carroll from Alexander G. Jones, Esq., pp. 22a-23a.

make an immediate decision and postpone the written opinion to follow upon completion of the typing of the record (R. 79). At the conclusion of the hearing and off-the-record, Judge Travers, one of two judges who heard this case, asked one of petitioners' attorneys if he desired a written opinion.[10] When told that a written opinion was desired, Judge Travers informed counsel that in that case decision would have to be postponed until after the court reporter had finished the transcript, a task the Judge warned, which might take considerable time because of other cases on which the court reporter was then working. Counsel for petitioners advised that he would appreciate an immediate ruling and would be satisfied if the court would file its opinion at a later date. The court however did not wish to rule without aid of the record, as had earlier been indicated (R. 79). Given the inevitable delay to be caused by this procedure, counsel suggested that the court dissolve the injunction until it had had the time to write an opinion upon receipt of the transcript, but the court declined this suggestion. The court thereupon announced that the temporary injunction would remain in effect (R. 80).

The final decision was not issued until August 30, 1968, twenty-three days after the *ex parte* temporary injunction had been ordered. However, counsel for petitioners had telephoned the court between the 17th and the 25th of August to suggest the need for a prompt decision.[11] Under the circumstances, counsel had done all that he could to get a prompt determination. The record clearly does not support

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[10] See affidavit of William Zinman, *supra*, for details of this exchange.

[11] Affidavit of William H. Zinman, *supra*.

respondents' contention that petitioners "did nothing to bring this matter to a hearing more promptly." [12]

3. *Appeal*

Similarly, respondents erroneously contend that there is no showing that petitioners moved to expedite the appeal and specifically that no motion was made under Maryland Rule 845(c)[13] to set the appeal ahead on the docket of the Maryland Court of Appeals. This contention is in plain contradiction of the facts.

On March 8, 1967 petitioners filed in the Maryland Court of Appeals and served on respondents a Motion to Advance Case for Hearing and Argument in the Court of Appeals of Maryland in conformity with Rule 845(c), cited by respondents. Moreover on March 16, Chief Judge Hall Hammond in fact granted the motion to advance oral argument, and the Clerk's letter of that date informed petitioners that the advanced date of argument would fall "between April 3rd and 14th." [14] Though inadvertently not included in the record by the Clerk of the Maryland Court of Appeals, certified copies of the motion and order have now been lodged with the Clerk of this Court and are printed in the Appendix of this Brief (App., *infra,* pp. 7a-8a).

Petitioners' motion to advance argument demonstrates that they cannot be held responsible for any delays that

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[12] Brief for respondents, p. 6.

[13] Rule 845(c) provides:

> A case may be argued in advance of its regular order on the docket only upon motion and for cause shown unless, upon its own motion, this Court advances the case for argument.

[14] App., *infra,* p. 6a, Letter of March 16, 1967 from J. Lloyd Young to William H. Zinman, Esq.

resulted on appeal in this matter. The motion recited that petitioners had been enjoined from exercising their First Amendment rights anywhere in the county and concluded that, "Since the Appellants are presently substantially prohibited from exercising all of their First Amendment rights within the confines of the entire county, it is urgent that this Court grant them a prompt and immediate hearing."

Nor does petitioners' Motion to Lengthen Time for Transmission of Record show otherwise (R. 23-24). As respondents note, petitioners had originally filed a Motion to Shorten for Transmission of Record contending that the injunction "constitutes patent violation of [petitioners'] First Amendment rights . . . and that every day that this interlocutory injunction remains in force and effect, the First Amendment rights of your Petitioners shall continue to be restricted" (R. 22). At the time of this latter motion, counsel were negotiating to have an agreed stipulation of facts replace the usual typed transcript of the proceedings, inasmuch as there appeared to be no dispute concerning the facts, and counsel informed the Clerk of the Circuit Court of these negotiations.[15] Counsel for petitioners prepared the stipulation, but counsel for respondents rejected the stipulation without himself offering one. He then required that the full transcript to be prepared, and petitioners were thereby forced to obtain an extension in which to order the transcript.

Petitioners' efforts to get a speedy decision went further. On May 16, 1967 following oral argument counsel

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[15] App., *infra*, p. 9a, Letter of October 6, 1966 to I. Theodore Phoebus from William H. Zinman.

wrote the Court of Appeals requesting a "decision in this case as soon as possible" since "a prompt decision by the highest Court on the questions presented by the appeal prior to their becoming moot, would be helpful in clarifying a situation which now appears very uncertain."[16] Counsel informed the Court that the need for a prompt decision was demonstrated by the fact that since the injunction was issued in this case, petitioners "have been systematically prohibited from speaking in many counties of the State including Baltimore City [*sic*] . . . and at the present time their request to engage in public debates has been turned down by several counties." By letter of May 18, 1967 counsel was informed that the case was under consideration by the court.[17] Decision was rendered June 7, 1967.

Efforts to advance this matter through the courts were diligently pursued. However, this Court may take judicial notice that no effort on either side could have expedited this case so rapidly that it could have reached this Court and been resolved before the ten-month injunction ran. This is especially so in the case of the ten-day *ex parte* temporary injunction, which was explicitly approved below. Arguments based on alleged mootness should not be allowed to obscure the continuing effect of the *ex parte* injunction as a device now available under Maryland law to effect prior censorship of speech.

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[16] App., *infra*, p. 10a, Letter May 16, 1967 to Court of Appeals, c/o Mr. James H. Norris, Jr. from William H. Zinman.

[17] App., *infra*, p. 11a, Letter of May 18, 1967 to William Harris Zinman, Esq. from J. Lloyd Young.

CONCLUSION

For all the reasons stated above as well as for the reasons discussed in petitioners' prior briefs in this Court, this case is not moot.

Respectfully submitted,

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